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DANIEL ANGLAND and DANIEL WHEELER, CO-ADMINISTRATORS OF THE ESTATE OF ROBERT E. ANGLAND, and CHARLES JOHNSON IV, ADMINISTRATOR OF THE ESTATE OF NANCY ANGLAND, Plaintiffs-Respondents, vs. MOUNTAIN CREEK RESORT, INC., a New Jersey Corporation and/or ABC CORPORATION (a fictitious name), WILLIAM TUCKER BROWNLEE, et al., Defendant. MOUNTAIN CREEK RESORT, INC. Third Party Plaintiff vs. WILLIAM TUCKER BROWNLEE, et al., Third Party Defendant-Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 069461 CIVIL ACTION ON MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY DECISION OF THE APPELLATE DIVISION DOCKET NO.: A-3100-10 (T4)

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BRIEF OF PLAINTIFFS-RESPONDENTS, DANIEL ANGLAND AND DANIEL WHEELER, CO-ADMINISTRATORS OF THE ESTATE OF ROBERT E. ANGLAND, AND CHARLES JOHNSON, IV, ADMINISTRATOR OF THE ESTATE OF NANCY ANGLAND IN OPPOSITION TO WILLIAM TUCKER BROWNLEE'S MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY DECISION OF THE APPELLATE DIVISION.

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TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

STATUTES

PRELIMINARY STATEMENT

The New Jersey Supreme Court does not need to address the issue raised in William Tucker Brownlee's Motion For Leave To Appeal because the New Jersey Legislature, clearly and unequivocally, included co-participant liability within the New Jersey Ski Statute. In fact, it would be a violation of the Constitution's Separation of Powers for any Court, including the Supreme Court, to disregard the clear intention of the Legislative and apply a different standard of care than that mandated in the ski statute.

In Mr. Brownlee's Preliminary Statement, his attorney states that his client "did nothing more than the Court has encouraged him to do, on more than one occasion: engage in a vigorous physical activity for his own benefit and that of this State's economy." Unfortunately, Mr. Brownlee did much more: he snowboarded in such a manner that he admittedly "lost control" before he collided with Robert Angland, blatantly violated the New Jersey Ski Statute and, at a minimum, contributed to the untimely death of a wonderful man. As far as the Angland family is concerned, if such conduct exposes him to a "ruinous judgment," so be it. The Angland family could only wish that Robert was alive today to worry about a monetary judgment.

STATEMENT OF PROCEDURAL HISTORY

Except for its decision to emphasize one part of the Procedural History of this case over the rest of the Procedural History, the Plaintiffs accept and adopt William Tucker Brownlee's Procedural History.

STATEMENT OF FACTUAL HISTORY

At the time of his accident, Robert Angland was a "very good skier" who was familiar with Mountain Creek's Lower Horizon Trail. (Da-56) On the date of the accident, William Tucker Brownlee had five-six years experience snowboarding and described himself as an "intermediate" snowboarder. (Da56-57)

The accident occurred shortly before Noon on Friday, January 19, 2007, when the ski trail in question was sparsely populated. The weather that day was clear and cold. (Da-166)

Allegedly, when Mr. Brownlee first saw the "phantom skier" in the brown puffy jacket, he was 10-15 feet away from him. At that time, the phantom skier was in front of him and to his left. At his deposition, Mr. Brownlee stated the phantom skier was at "eleven o'clock" to his position. Significantly, there were no other skiers or snowboarders nearby at that time. (Da-84)

Although Mr. Brownlee could not estimate the precise speed of the phantom skier when he first observed him, he testified at his deposition that he was not moving fast at that time. At that same time, Mr. Brownlee estimated his speed at only 15 m.p.h. (Da-85)

Mr. Brownlee also stated at his deposition that the phantom skier cut to his right and decreased his speed. As a result, he testified that he cut to his left. (Da-87) BEFORE Mr. Brownlee's snowboard went over one of Mr. Angland's skis and under his other ski, he acknowledged that he was out of control. In fact, at his deposition, he went so far as to state that even if he did not collide with Mr. Angland, he still would have fallen. (Da-99)

Immediately after the accident, Greg Pack, Vice President and Managing Director of Mountain Creek, skied over to Mr. Brownlee, who was approximately fifteen (15) feet from Mr. Angland and the bridge. Less than one minute after the accident, Mr. Pack asked him what happened. At that time, Mr. Brownlee simply stated that he was cut-off and involved in a collision. (Da 146-147)

Within thirty minutes of the accident, William Tucker Brownlee told his close high school friend, Keith Eilerstan, who accompanied him to Mountain Creek that day, that a lady fell in front of him and, as a result, he steered off to his <u>right</u> and collided with Mr. Angland. (Da-106) Mr. Brownlee also gave a written statement to Mountain Creek's ski patrol and spoke to the Vernon Police Department on the day of the accident. (Da-72)

In none of his four statements on the day of the accident--to Mr. Pack, Mr. Eilerstan, Mountain Creek's ski patrol or the Vernon police--did Mr. Brownlee identify the phantom skier by way of age, sex or clothing.

Subsequently, months later, Mr. Brownlee stated in a written statement, and in certified interrogatory answers, that Mr. Angland fell and slid down the hill after the accident. (Da-51) Yet, he testified at his deposition a short-time later that he did not see Mr. Angland fall or slide. (Da-94)

Mountain Creek's accident reconstruction expert has prepared a report stating that the collision between Mr. Brownlee and Mr. Angland most likely occurred approximately one hundred (100) feet from Mountain Creek's bridge and that it is equally likely that Mr. Angland's multiple facial fractures were caused by that collision, as opposed to by contacting the bridge. (Da-64)

LEGAL ARGUMENT

POINT I

MR. BROWNLEE HAS NOT SHOWN THAT THE INTEREST OF JUSTICE WARRANTS THE GRANTING OF HIS MOTION.

Interlocutory review runs counter to a judicial policy that favors "uninterrupted proceeding at the trial level with a single and complete review." In re Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 404 (1956). Moreover, the grant of leave to appeal an interlocutory order is itself highly discretionary and it is customarily exercised only sparingly. State v. Relden, 100 N.J. 187, 205 (1985). William Tucker Brownlee has not shown that the "interest of justice" warrants the granting of his Motion. Therefore, it should be denied.

Nothing in the Trial Court's decision or the Appellate Court's decision prevents Mr. Brownlee from presenting a defense at trial. As held in Moon v. Warren Haven Nursing Home, 182 N.J. 507, 513 (2005), appeals prior to and during trial waste the time and resources of the parties. A system allowing frequent appeals before or during trial in many cases would result in the separate adjudication of each issue.

Justice Brennan outlined the policy underlying restrained appellate review of issues relating to matters still before the trial court as follows: "One of the fundamental underlying postulates of our present judicial system, namely, that a judicial system better serves the public interest by uninterrupted trials than would be the case if final dispositions were suspended pending appellate review of intermediate action in the cause." We favor the approach that "lays its stress upon the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review." Trecartin v. Mahony-Troast Constr. Co., 21 N.J. 1, 5-6 (1956).

In his brief, Mr. Brownlee argues that this Court should resolve the "novel" issue in dispute in this case because it has never previously been presented to the Court. Apparently, the Trial Judge and the Appellate Division did not believe the subject issue was so novel because each summarily rejected it. In fact, one of Mr. Brownlee's complaints herein is that the Appellate Division did not seriously address his argument. The Anglands would respectfully disagree and argue that the both tribunals gave Mr. Brownlee the time and consideration his argument merited. After all, and Mr. Brownlee has never addressed

this issue, even at oral argument below: if the Legislature did not intend for the ski statute to address co-participant liability, why then does the statute address individual skier/snowboarder conduct and injuries to "other skiers?" N.J.S.A. 15:13-4(a) and (b).

A. Applicability of the Ski Statute

The New Jersey Ski Act addresses co-participant conduct. In that regard, the Committee Statement that precedes N.J.S.A. 5:13-1, states:

> The purpose of this bill is to establish in statutory law the responsibilities and liabilities of ski area operators and skiers with regard to skiing accidents. These responsibilities and liabilities are currently covered under the general law of negligence, which is primarily case law. A Vermont case, Sunday v. Stratton, has caused considerable concern nationwide among ski area operators and their insures over the potential liability of ski area operators for skiing injuries. In the Sunday case, the Court held that the doctrine of assumption of risk as a defense which would completely bar recovery in negligence cases was no longer applicable because of the adoption of a comparative negligence statute. Prior to the case, this doctrine was one of the major defenses in actions based on skiing accidents. A comparative negligence statute was enacted in New Jersey in 1973. The uncertainty over what effect the Sunday case will have on the liability of ski operators for skiing injuries has led to increases in the cost of liability insurance. It also poses a threat to the availability of this type of insurance which is currently provided by only a few insurers. The bill, as introduced, proposes to deal with the problem by specifically listing the responsibilities of ski area operators and skiers! (Emphasis Added)

Clearly, the referenced statute was intended to supersede the common law when the culpability of skiers and operators was an issue in the case. As the New Jersey Supreme Court stated in Brett v. Great American Recreation, Inc., 144 N.J. 479 @ 496, when the ski statute applies, "the Legislature intended completely to displace the common law with regard to the statutorily defined parties."

In his brief, Mr. Brownlee challenges this holding and argues that the common law recklessness standard is applicable when a skier sues another skier/snowboarder. He also argues there is no supporting precedent--anywhere in the nation--for the lower Courts' decisions. Mr. Brownlee is wrong.

In Dillworth v. Gambardella, 970 F.2d. 1113 (1992), the Plaintiff was skiing at Stratton Mountain in Vermont when the Defendant collided with him. Although the trial testimony was inconsistent on many factual issues, all agreed that the collision occurred at the bottom of the Black River Trail intermediate slope where skiers congregate in a line before boarding a chair lift. Id. at 1115. Plaintiff filed suit in the United States District Court for the District of Vermont. After a five day trial, the jury returned a verdict in favor of the Defendant and the Plaintiff appealed. Id. at 1114.

The principal issue raised on appeal was whether the Vermont Sports Injury Statute, Vt.Stat.Ann. tit. 12, ¶ 1037 (1991), that provides for the assumption of certain risks by participants, applied in a negligence action brought by one skier against another for a collision between them.

On Appeal, the Plaintiffs argued that the affirmative defense provided by ¶ 1037 of the statute should be available only to operators of ski areas or other sports facilities. In support of their position, they cited the statement of legislative purpose specifically included in the Act which delineated the entities protected by the legislation. The legislative purposes stated: "It is a purpose of this act to state the policy of the state which governs the liability of operators of ski areas with respect to skiing injury cases..." Id. at 1120.

Before deciding the case, the Court reviewed the history of Vermont law starting with Wright v. Mt. Mansfield Lift, Inc., 96 F.Supp. 786 (D.Vt. 1951) and Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781 (D.Vt. 1976). Additionally, it also reviewed Sunday v. Stratton Corp., 136 Vt. 293 (1978), the case behind the enactment of New Jersey's statute. Thereafter, it concluded that the statutory language contained no such limitation. Rather, it held the statute was drafted to address the conduct of skiers and the risks they

assume. Hence, the Second Circuit Court of Appeals concluded that the referenced affirmative defense was available to all potential Defendants.

The present matter should result in the same conclusion. N.J.S.A. 5:13-1(b) states that the purpose of the New Jersey Ski Statute is to make explicit a policy of this state which clearly defines the responsibility of ski area operators and skiers.

N.J.S.A. 5:13-4 specifically delineates the duties of skiers. More particularly, N.J.S.A. 5:13-4(a) mandates that "skiers shall conduct themselves within the limits of their individual ability and shall not act in a manner that may contribute to the injury of themselves or any other person." Section (b) states "that no skier shall…(n) knowingly engage in any act or activity by skiing or frolicking which injures other skiers while such other skiers are either descending any trail, or standing or congregating in a reasonable manner, and due diligence shall be exercised in order to avoid hitting, colliding with or injuring any other skier or invitee." Additionally, Section 5 states that no skier shall "knowingly engage in any type of conduct which may injure any person" and, most importantly, Section C mandates that "every skier shall maintain control of his speed and course at all times."

Without question, and the Anglands do not believe there is a reasonable argument to the contrary, the New Jersey Ski Statute addresses co-participant culpability. Therefore, Mr. Brownlee's Motion should be summarily denied.

In his brief, Mr. Brownlee also argues that if a negligence standard is applied to co-participants, the number of people who choose to ski/snowboard will decrease. The Jagger Court, cited by Mr. Brownlee, however, came to a different conclusion. In Jagger v. Mohawk Mountain Ski Area, 849 A.2d 813 (Conn. 2004), the Court reasoned that applying a negligence standard would actually promote participation in the sport because more people would probably choose to ski if they knew their co-participants were skiing in a reasonable manner.

B. The Appellate Court's Decision

In his brief, Mr. Brownlee argues that the Appellate Division failed to consider the legal issue in dispute. On the contrary, the Appellate Division directly addressed the (non) issue. In that regard, in its decision, it directly cited the most relevant part of the statute--the "Duties of Skiers" section--and concluded that it unequivocally addressed co-participant liability. (Da203-205) Thereafter, citing and deferring to this Court's decision in Brett, supra., the Appellate Division held that the "Ski Act

completely replaces the common law with respect to the activities and persons it covers." (Da202) Hence, Mr. Brownlee's less than subtle attack on the Appellate Division panel that considered his appeal is meritless.

POINT II

EVEN IF A RECKLESSNESS STANDARD IS APPLIED, A JURY MUST STILL DECIDE IF WILLIAM TUCKER BROWNLEE'S CONDUCT BREACHED THAT STANDARD.

Under New Jersey law, reckless conduct is defined as "an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and which thus is usually accompanied by a conscious indifference to the consequences." Schick v. Ferolito, 167 N.J. 7 @ 19 (2001). Moreover, the applicable standard is an objective standard that can be "proven by showing that a Defendant preceded in disregard of a high and excessive degree of danger either known to him or apparent to a reasonable person in his position." Id.

In the instant case, given William Tucker Brownlee's many inconsistent statements, and given the fact that he did not provide any description of the alleged phantom skier until litigation commenced, a reasonable jury could conclude that the woman who allegedly fell in front of him and/or the man who cut him off are figments of his imagination. If the jury so concludes, it will not be difficult for the jury to further conclude that the reason

Mr. Brownlee made up the phantom woman/skier is because he was snowboarding recklessly and is trying to avoid liability.

Furthermore, the accident in question occurred on a Friday morning when the mountain was sparsely populated. While Mr. Brownlee did see other people on the trail that morning, he did not see any other people around at the time of the accident. Even if a woman fell in front of him or a skier cut him off, a reasonable jury could still conclude that his actions were reckless. Afterall, why did Mr. Brownlee "panic stop" when there was only one skier around, who was skiing slowly, and plainly visible fifteen feet away?

Mr. Brownlee also acknowledged that he lost control prior to the time he crossed over Mr. Angland's skis. And, as previously indicated, Mr. Brownlee apparently lost control even though the phantom skier was approximately (15) fifteen feet away from him while each was skiing slowly. Under those circumstances, even if a jury concludes there really was another skier nearby, it could also conclude that Mr. Brownlee's actions in cutting across the mountain directly in front of oncoming skiers/snowboarders, who may have been in front of him, was reckless.

Additionally, Defendant Brownlee now contends that Mr. Angland was up hill from him at all relevant times. However, the diagram that he prepared on the very day of the accident indicates that Mr. Angland was downhill and to his left when he commenced his evasive action. As such, Mr. Angland should have been visible to Mr. Brownlee at all times. Furthermore, according to Mr. Brownlee's diagram, he did not stop and turn quickly to avoid the phantom skier. Rather, he proceeded in a fairly straightforward manner, and because of the slope of the hill, cut-off Mr. Angland who was in front of him and to his left. (Was Mr. Angland the phantom skier?)

Finally, Mr. Brownlee's testimony is inconsistent with Mountain Creek's biomechanical engineer's review of the evidence. In his report, Dr. Irving Scher concluded that the impact with Mr. Angland occurred approximately one hundred (100) feet from the bridge and that said impact was significant enough to fracture a number of Mr. Angland's facial bones. This testimony is significantly different from Mr. Brownlee's testimony and thereby gives the jury yet another reason to disregard all of Brownlee's "story."

In the very large majority of cases, it is for the jury to determine the culpability of the parties. The difference between negligent conduct, grossly negligent

conduct and reckless conduct is simply one of degree. Monaghan v. Holy Trinity Church, 275 N.J. Super 594 (App. Div. 1994). Such an assessment should be made by a jury, especially given Mr. Brownlee's various versions of the accident. A jury should have the opportunity to observe him, listen to his testimony and assess his credibility. This Court, obviously, cannot do that. Therefore, at the very least, even if this Court grants Mr. Brownlee's Motion and then reverses the Appellate Division's decision, it should still remand this matter for trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court deny Mr. Brownlee's Motion for Leave To Appeal.

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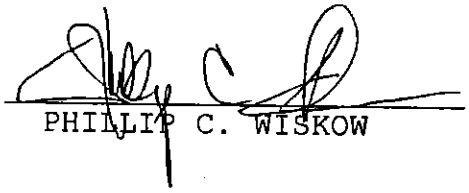
By: 
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